UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO OFFICE

EXPRESS MESSENGER SYSTEMS, INC.
D/B/A ONTRAC

and **Case: 21-CA-137530**

TEAMSTERS LOCAL UNION NO. 63,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Lara Haddad, Esq., for the General Counsel.

Michael G. Pedhirney, Esq.
(*Littler Mendelson*), for the Respondent.

Raquel Ortega, Esq. (Hayes & Cunningham, LLP),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. I presided over this trial in Los Angeles, California, on April 20, 2015, pursuant to a complaint and notice of hearing issued by the Regional Director of Region 21 of the Board on January 30, 2015. The complaint alleges that Express Messenger Systems, Inc., d/b/a Ontrac ("Respondent" or "Ontrac") violated Sec. 8(a)(1) of the Act when its supervisors or agents made threatening or coercive statements to its employees regarding their activities in support of Teamsters Local Union No. 63, International Brotherhood of Teamsters ("Union" or "Charging Party") and/or regarding their protected concerted activities. More specifically, the complaint alleges that Respondent, through its supervisors or agents, created the impression that its employees' union or protected activities were under surveillance; told an employee that he could not discuss problems at his workplace with other employees, and threatened discipline if he continued to do so; and informed an employee that could not discuss the Union or distribute union materials at Respondent's premises, and threatened reprisals if he did so.

FINDINGS OF FACT

I. Jurisdiction and Labor Organization Status

Respondent admits, and I find, that it is a Delaware corporation with an office and place of business in Commerce, California, where it is engaged in the regional distribution and delivery of packages in several states within the United States. In conducting its business operations during the 12-month period ending on September 30, 2014, a representative period, and it performed services valued in excess of $50,000 in States other than the State of California. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

Respondent also admits, and I find, that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

As briefly described above, Respondent is engaged in the distribution of packages and parcels from its facility in Commerce, California, a city in the Los Angeles metropolitan area. Trucks loaded with packages arrive at Respondent's Commerce facility ('the facility"), and these packages are unloaded, sorted, re-loaded in other trucks or vehicles, and sent out for distribution and delivery. The Union was certified as the collective-bargaining representative of a unit of drivers based at the facility in March 2013, and Respondent and the Union reached a collective-bargaining agreement covering these drivers in May 2014. Sometime during June 2014, the Union began organizing the sorters at Respondent's facility, who are the employees who unload, sort, and re-load the packages, and who for the most part work inside the facility. Respondent employs about 175 sorters at the facility, and the Union filed a petition with Region 21 of the Board on August 26, 2014, seeking to represent these sorters. Pursuant to this petition, an election was scheduled to take place on October 7, 2014, but the election was ultimately blocked by the Regional Director on October 3, 2014, pending the outcome of the unfair labor practice proceedings in the present case. These facts are undisputed. (Tr. 14-22; GC Exhs. 2, 3, and 4.)[1]

Dennis Crosby has been Respondent's general manager at the facility since February 2013. Respondent admits that he is a supervisor within the meaning of Section 2(11) of the Act, and agent within the meaning of Section 2(13) of the Act. The complaint also alleges, and Respondent admits, that "at all times material herein" Frederick Gutierrez has been Respondent's "Lead Supervisor," and as such a supervisor within the meaning of Section 2(11) and agent within the meaning of Section 2(13) of the Act. (Tr. 152; GC Exhs. 1(d); 1(f)). It is not clear, however, exactly on what date Gutierrez assumed the position as an alleged 2(11) supervisor.[2]

[1] Transcript pages will be referenced as "Tr.," followed by the page number(s); The General Counsel's Exhibits will be referenced as "GC Exh.," followed by the exhibit number(s).

[2] According to Gutierrez' testimony, he was a "lead sorter-yard coordinator" until July 2014, at which time he was promoted to "PM Operations Manager." (Tr. 130-132; 135). It is not clear whether Gutierrez had 2(11)

G4S Security Solutions ("G4S"), pursuant to a contract with Respondent, employs security guards to provide security services for Respondent at its facility. (GC Exh. 5.) The security guards employed by G4S patrol different areas of the facility, and are also posted at gates and entrances to the facility. As further discussed below, among their duties is to help log in and direct incoming trucks to different areas at the facility, in coordination with the "yard coordinator," who is employed by Respondent. One of the security guards assigned by G4S to the facility, David Fragoso, as described below, is alleged to have made coercive comments regarding union or protected activity to George Mariscal, an employee of Respondent, comments which the General Counsel imputes to Respondent.

Mariscal was hired by Respondent, initially as a sorter, in May 2014.[3] About a month after he was hired, Gutierrez began training him to assume the role of "yard coordinator," one of the functions that Gutierrez had performed until that time. Gutierrez was at the time also the "lead sorter," until he was promoted to manager in July, as described in footnote 2.[4] Gutierrez testified that Mariscal's training as yard coordinator lasted a little over a month. Mariscal began training as yard coordinator in mid-June, and worked in that capacity for about 70 days, after which he was transferred back to being a sorter, sometime in August. (Tr. 23-24; 58; 66; 77-78; 130; 140-141.) As discussed below, Mariscal, the only witness called by the General Counsel (or Union), was the alleged recipient of statements by Respondent or its agents alleged by the General Counsel as unfair labor practices

B. The Impression of Surveillance from Statements by Gutierrez

Mariscal testified that he became aware that the Union was trying to organize the sorters at Respondent's facility sometime in June, at which time he was already training as a yard coordinator, and had spoken about the Union with the drivers, who were already represented by the Union. He wanted to know how to go about getting authorization cards in order to sign up employees, and decided to ask Gutierrez, with whom he had a friendly relationship and considered a mentor—and whom Mariscal believed to be sympathetic toward the Union. Sometime in July, he ran into Gutierrez, who was still lead sorter/yard coordinator at the time (prior to his promotion to PM manager), at the employee break room, which was undergoing renovation. Like other parts of the facility, the break room had security video surveillance cameras. Mariscal testified that while in the break room, he asked Gutierrez if he had authorization cards, or knew where he could get them. Gutierrez, according to Mariscal, told him to "quiet down" and step outside the break room. Once outside, Gutierrez told Mariscal that he believed the security cameras might have audio recording capabilities, and that they should not talk about the Union in the presence of those cameras because their conversation might be

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supervisory authority as the "lead sorter," but it is clear that he did once he became PM operations manager. As discussed below, this ultimately has little significance.

[3] All dates hereafter shall be in 2014, unless otherwise indicated.

[4] In his testimony, Gutierrez explained that he was too busy as lead sorter to be also responsible for the duties of yard coordinator, which is the reason Mariscal was chosen to take over that role (Tr. 138; 147). No evidence was proffered as to who chose Mariscal for this role, or why. According Gutierrez, the main function of the yard coordinator was to direct incoming and outgoing truck traffic, in conjunction with the security guards at the gates, directing the trucks to their assigned docks or parking areas, as well as writing down information regarding the time of arrival, their "door" (or docking area), the time unloading started, and other information. (Tr. 140).

recorded.[5] Mariscal also testified that he had had several conversations with Gutierrez about the Union during this general time period, as well as with other supervisors, during which he had sought advice about the Union (Tr. 28-30; 71-76).

Gutierrez initially denied that he had had this conversation regarding the security monitoring equipment with Mariscal at all, and generally denied having any conversations with Mariscal about the Union, as Mariscal had alleged. (Tr. 132-133) During cross-examination, however, Gutierrez admitted that he was aware that union organizing was going on, and admitted that he indeed had had conversations with Mariscal about the Union and authorization cards on several occasions. (Tr. 142-143.) Given the fact that Gutierrez in essence confirmed everything that Mariscal had testified about regarding their relationship and their conversations, except for the conversation about the security surveillance equipment, I credit Mariscal's testimony, and find that the conversation at or near the break room occurred as Mariscal described it. In crediting Mariscal, I note that his testimony was rich in details and candid in its telling, as well as unwavering during cross-examination. I also note that Mariscal's status as a current employee enhances his credibility. Moreover, I find it highly unlikely that Mariscal would fabricate or embellish testimony regarding an individual whom he considered a mentor and with whom he had a friendly relationship. Gutierrez, on the other hand, who was soon thereafter promoted to a managerial position, has reasons not to admit having conversations that may be viewed as sympathetic toward the Union or those employees supporting it, something that might at best be seen as embarrassing and at worst viewed as disloyal.

Accordingly, I find that Gutierrez told Mariscal that they should step outside the break room to talk about the Union, because the security surveillance system might pick up or record their conversation, as testified by Mariscal.[6]

C. Crosby's Alleged Comments Regarding Mariscal's "Badmouthing" of Managers

Mariscal testified that starting in July, when he was already working as yard coordinator, he had conversations about the Union with other employees in the parking lot at Respondent's facility, sometimes with the drivers (who were already represented) and other times with sorters who the Union was seeking to organize. Sometime in August, the day after he had one of these conversations with the employees in the parking lot after their work shift ended, he was summoned by General Manager Dennis Crosby into his office. Present in Crosby's office, in addition to Crosby, was also Bernardo Saronaman, a manager. Mariscal testified that Crosby told him that it had come to his attention that he had been "badmouthing" managers in the parking lot, and that such conduct was unprofessional, and that if this conduct continued he could receive a verbal or written warning. Crosby also said that there were "actually people who appreciated what they're doing," apparently referring to their jobs. Mariscal testified that Crosby did not explain what he meant by "badmouthing," which was the exact term that he used. When

[5] Mariscal, during cross-examination, testified that Gutierrez had actually told him he had seen--and heard—some of these recordings on a security monitor (Tr. 72).

[6] Whether such statement constitutes creating the impression of surveillance, as alleged by the General Counsel, is a separate issue, as discussed below.

Mariscal asked Crosby which employee(s) had made this complaint, Crosby responded that this information was confidential.[7] (Tr. 31-39; 51; 84-85; 87-88.)

During his testimony, Crosby denied that this particular meeting with Mariscal had ever taken place, specifically denying that he had ever told Mariscal anything about "badmouthing" managers, or threatened Mariscal with discipline if such conduct continued. He also denied that any employee(s) had complained to him about Mariscal "badmouthing" managers. Crosby additionally testified that the only meeting he had in his office with Mariscal, in which Saronaman was present, was a meeting during which he informed Mariscal that his performance as yard coordinator was wanting, because he had misdirected some trailer (trucks) to the wrong docks, resulting in packages being misplaced. After this conversation, Crosby removed Mariscal as yard coordinator, re-assigning him to his initial job as a sorter, working on the lines. (Tr. 155-157; 158-160.)[8] Curiously, Saronaman did not testify.

For the reasons I explained previously, I found Mariscal to be a credible witness, providing rich details during his testimony, which did not waiver in the least during cross-examination. As mentioned above, his status as a current employee enhances his credibility, and I find it highly unlikely that he would have fabricated or embellished the story of this meeting with Crosby and Saronaman with the amount of details he provided, including his meeting with a group of employees the evening before. On the other hand, I do not find Crosby's denial of the meeting as convincing, particularly in view of the fact that Saronaman—who was identified by Mariscal as being present-- was not called to testify by Respondent. I thus find that an adverse inference is proper in this instance. Moreover, there is additional evidence suggesting that Crosby was playing close attention to what Mariscal was doing and saying during this time, as discussed below regarding an incident involving the security guard, which makes it more likely that Crosby quickly learned about Mariscal's activities and responded in the manner described by Mariscal.

Accordingly, I credit Mariscal's testimony that this meeting took place and that Crosby made the comments about Mariscal's "badmouthing" managers, as described by Mariscal.

D. Crosby's Alleged Comments Regarding Mariscal's Activities During his Breaks

Mariscal testified that about 1 week after the meeting with Crosby described above, in early September, he had another meeting and conversation with Crosby regarding Mariscal's interactions with other employees.[9] The manner this meeting came about is somewhat confusing, so some background information is in order.

[7] Mariscal testified that the evening before his meeting with Crosby, around 10 p.m. after the work shift ended, he had met with a group of employees and discussed the Union, as well as problems they were having at work with some of the managers, their work loads, and other conditions at work. He testified that some of the employees had voiced specific complaints about some of the managers, whom he named (Tr. 35-36).

[8] Mariscal admitted that he had received a written warning for this mistake, which resulted in his being removed as yard coordinator, something that he considered akin to a "demotion." (Tr. 86).

[9] Mariscal initially testified that this conversation had occurred in August, but later corrected it to September, right after Labor Day.

According to Mariscal, whether part-time employees such as himself can take a 10-minute break or are entitled to a longer 30-minute (lunch) break depends on how many hours they are scheduled to work. Normally, employees working longer than a 6-hour shift are entitled to a 30-minute (lunch) break, in addition to their normal 10-minute break. Mariscal normally worked a 4-hour shift, from 6 to 10 p.m., and was thus only entitled only to a 10-minute break during his shift. On this particular day, however, the Tuesday following Labor Day, he was called to start his shift at 4 p.m. instead, because of the extra workload created by the holiday, and thus was scheduled to work a 6-hour shift that day. Normally, supervisors or managers tell employees when to take their breaks. On this day, Mariscal testified that he was uncertain as to whether to take a 10-minute break or a 30-minute break, but could not find a supervisor or manager to get the proper instructions. Mariscal then ran into Paula (Ruiz), a manager for Respondent's HR department, and asked her which break to take. Ruiz told Mariscal to take his 30-minute break. At that point another supervisor named Danny (last name unknown), joined the conversation and told Mariscal to take both his 30-minute and 10-minute break, together. Mariscal, uncertain about the conflicting instructions, then approached Bernardo Saronaman and explained the dilemma. Saronaman told Mariscal to take his 10-minute break now, and worry about the 30 minute break later (the entire line had shut down at the time for a 10-minute break). Mariscal proceeded to take his 10-minute break, and just when the 10 minutes were about to end, another manager, Frank Weber, instructed Mariscal to take his 10-minute break, immediately followed by the 30-minute break. (Tr. 40-48; 67-68.)

The following day, immediately after his shift ended, Mariscal, noticed some employees heading to the corporate office, where they were going to watch a video about unions, apparently as part of the election campaign then taking place—the Union had filed its petition a few days earlier. Mariscal asked his manager, Gutierrez, if he could also watch the video, and Gutierrez told him he could, but that he needed to clock back in. Mariscal did so, and headed inside the office where the video would be shown. As he entered the room, Paula Ruiz directed Mariscal to go to an adjacent break room and wait. Shortly thereafter, Ruiz and Crosby entered the break room and told Mariscal they wanted to speak to him. According to Mariscal, Crosby told him that an incident had been brought to his attention—that Mariscal did not know who to follow orders from. Mariscal asked what he meant, and Crosby said that he had been told to take his 30 minute break at 6 pm the day before, but had not followed those instructions. Mariscal told Crosby that he had received conflicting information from various supervisors and was only trying to get clarification. Crosby told Mariscal that he did not believe his story, that he believed he was lying. He added "I know what you are doing" (Tr.90), adding that the reason he (Mariscal) was trying to get a 10-minute break with everyone else is just so he can talk to everyone else. Mariscal asked Crosby what he meant, but Crosby did not clarify.[10] (Tr. 40-48; 67-68; 89-90.)

[10] Apparently, all sorters take their 10-minute break at the same time, and the entire production line is shut down during that time, whereas the 30-minute "lunch" breaks are staggered, with different employees taking this break at different times. (Tr. 45-48.) The implication of Crosby's alleged comments is that Mariscal wanted to take the 10-minute break at the same time as everyone else so that he could approach more people in order, presumably, to talk to them about the Union or other work-related matters. The flaw in this interpretation is that it did not really matter if Mariscal was on his 30-miniute or his 10-minute break at the same time that all other employees were at their 10-minute break—Mariscal would have, in any event, been able to talk to everyone else at 6 pm, during their 10-minute break, regardless of what type of break *he* was in.

Mariscal also testified that after Crosby told him he was lying, he said he was going to check with the other managers and review video camera footage to check the accuracy of Mariscal's story. (Tr. 44-45.)

Crosby denied that this conversation took place, and specifically denied saying anything to Mariscal about his breaks or about wanting to take his breaks at the same time as everyone else in order to be able to talk to them. Indeed he insisted the only conversation he had with Mariscal was about his performance, as described above. (Tr. 156.)[11] Ruiz did not testify, which is again curious under the circumstances, since Mariscal testified she had been present during this meeting.

Once again, this presents a head-on credibility issue, since Mariscal's testimony is completely at odds with Crosby's. For the same reasons I discussed above, I credit Mariscal's testimony, noting that particularly in this instance he goes into minute details as to how—and why--this meeting with Crosby came about, details and circumstances which I find very unlikely to have been fabricated or embellished. As with the prior meeting with Crosby, another manager is alleged to have been present in the room when this conversation occurred—Ruiz—who was not called as a witness. I draw a negative inference from Respondent's failure to call Ruiz as a witness, and conclude that this meeting and conversation took place as Mariscal testified to.

Accordingly, I find that Crosby told Mariscal that he knew why Mariscal wanted to take his breaks at the same time as others—so he could talk to them.

E. The Statements Allegedly Made by Security Guard Fragoso

Mariscal testified that during the period he was the yard coordinator, which was mid-June to late August, he befriended David Fragoso, a security guard employed by G4S who was posted at Respondent's facility, including duty at one of the gates where both trucks as well as employees would come through. He and Fragoso even exchanged cell phone numbers and sent text messages to each other about getting together to socialize after work—although that actually never came about. Mariscal testified that he would talk to Fragoso about work-related things, including the Union, as well as other things not related to work. (49-51; 56-57; 63.)

On or about September 22, by which time Mariscal was no longer yard coordinator, he arrived at the facility and parked at the employee parking lot near the gate were Fragoso was posted. He noticed that Corby's car was parked nearby, which was unusual because Crosby usually parked on the opposite side of the facility, at the management parking lot.[12] Mariscal greeted Fragoso, and after making some small talk, pointed at Crosby's car, and suggested (in jest) that Crosby had parked there so he could "keep tabs on us" (the employees). As he started walking away, Fragoso stopped him and said he had to give Mariscal the "head's up" about something. Mariscal asked about what, and Fragoso told him that he had been given special orders not to allow any type of union activity or employee meetings in the parking lot—that if he

[11] This not entirely accurate, as described below, since Crosby later admitted confronting Mariscal about something he had said to the security guard regarding Crosby's car.

[12] Mariscal testified he was familiar with Crosby's car because he had seen him drive it on several occasions, and it was a distinctive-looking car, a red Mini Cooper with a stripe.

saw any type of such activity take place, he had to "shut it down." Fragoso did not specify who had given such orders. Mariscal then told Fragoso, that as a friend, his advice was for him not to get involved, because he would be infringing on employee rights if he did. (Tr. 50-55; 92-93.)

Fragoso, called to testify by Respondent, testified that he worked as a security guard at the facility from March to November as an employee of G4S. He reported to the "post commander," also employed by G4S, who was also stationed at the facility. Although he patrolled in different parts of the facility, he was also posted at the entrances or gates to the facility, where one of his duties was to log-in incoming trucks and, in coordination with the yard coordinator, direct trucks to "doors" (docks) or parking areas where Respondent wanted them.[13] He acknowledged having met Mariscal when the latter had been yard coordinator, and admitted they had become friendly, exchanging phone numbers and text messages, and discussing getting together after work. Fragoso in essence confirmed everything Mariscal testified about with regard to their interactions, except for Mariscal's testimony regarding Fragoso warning him that he had been instructed to stop employees from engaging in union activity in the parking lot. Fragoso denied that he had ever said anything to Mariscal in that regard, and denied that he had ever received instructions from Respondent (or G4S) to do so. (Tr. 114-116; 119-123.)

Once again, there is a direct conflict in the testimony, this time between Fragoso and Mariscal with regard to the alleged statement by Fragoso regarding employees' union activity. I credit Mariscal's testimony, for the following reasons. First, as previously discussed, I have found Mariscal's over-all testimony to be credible, and I find no reason to discredit him with regard to this particular testimony. As discussed above, Fragoso confirmed every aspect of Mariscal's testimony except for this one aspect. Second, I find, on the other hand, there are valid reasons not to fully credit Fragoso's testimony. Fragoso was inconsistent, contradicting himself on certain things. For example, initially Fragoso testified that he did not recall having any "discussions" with Mariscal about the Union (Tr. 116-117), only to later acknowledge, ever so slowly, that indeed he had had more than one conversation with Mariscal about the Union (Tr. 117-118; 122-123). Additionally, I noted Fragoso's demeanor was tense, and while appearing at a formal proceeding and providing testimony under oath may explain part of his nervousness, there appeared to be something else involved. I thus note that if Mariscal's testimony was true, as I found it to be, it would mean that Fragoso had done something against the interest of both Respondent as well as his own employer, G4S, both of which would be embarrassed, if not exposed to legal liability, for his statements. Fragoso therefore appeared to be on an uncomfortable denial mode, like the proverbial kid caught with his hands in the cookie jar, and clearly trying to protect himself. Moreover, his admitted friendly relationship with Mariscal makes it more likely, in my view, to he would have alerted Mariscal (i,e., giving him the "head's up," as Mariscal testified) about the instructions he may have received regarding stopping union activity in the parking lot. Finally, something that occurred immediately after his conversation with Mariscal on this occasion suggests that Fragoso may have had a closer connection with Respondent's management than he was letting on. Mariscal testified that about 15 minutes after his conversation with Fragoso, during which he had suggested that Crosby had parked his car in

[13] Although Fragoso testified that he did not have daily interactions with Respondent's managers at the facility (Tr. 116), he admitted that Respondent's managers would contact him if there were any incorrect entries in the log-in reports, and that he would communicate with the yard coordinator regarding where the trucks should be directed to (Tr.120-121).

the employee parking lot in order to "keep tabs" on the employees, Crosby confronted him about this incident. Mariscal testified that Crosby, who seemed upset, told him that he should not be speaking to security guards or asking them questions about his car or other matters (Tr. 94). Indeed, Crosby admitted he confronted Mariscal about this, and that he had received the report about what Mariscal had said from the security personnel, although he did not say from whom. (Tr. 160-161.)

In my view this incident plainly suggests two things. It suggests, as I discussed during my evaluation of Crosby's testimony, that Crosby may have been keeping a close watch on Mariscal's activities, and may have instructed the security personnel to report anything regarding Mariscal. Mariscal's comments to Fragoso regarding Crosby parking his car in the employee parking lot in order to keep tabs on them were fairly innocuous, even if they seemed "paranoid," as Fragoso testified (Tr. 124). A reasonable person would not likely have deemed it necessary or important to report such comments, unless instructed to do so. Fragoso obviously reported Mariscal's comments, which also suggests that he had a closer and more direct relationship or connection with Respondent's managers than he led on, having indicated that he seldom had any contact with them. In sum, I found Fragoso's testimony not to be candid or telling of the "whole" truth, and I credit Mariscal's testimony.

Accordingly, I find that Fragoso told Mariscal that he had been instructed to stop union activity in the parking lot, as testified to by Mariscal.

Discussion and Analysis

I. The Alleged Creation of the Impression of Surveillance by Gutierrez

In paragraph 7 of the complaint, the General Counsel alleges that when Gutierrez told Mariscal to step out of the break room to discuss the Union, because there were cameras in place that had (or might have) audio recording capacity, Respondent created the impression that it was engaged in surveillance of its employees union or protected activity. Although I have credited Mariscal's testimony and found that Gutierrez made the above-described statement, I do not agree that this constituted creating the impression of surveillance.

First, it should be noted that a valid issue could exist as to whether Gutierrez was a 2(11) supervisor at the time he made the comment to Mariscal, as argued by Respondent in its post-hearing brief. The evidence, as discussed in the Facts section, indicates that at the time of the statement, Gutierrez was the "lead sorter," who was training Mariscal at the time to assume the function of yard coordinator, a function that Gutierrez had also been performing. It is not completely clear whether in his capacity as a "lead sorter" Gutierrez actually had 2(11) supervisory authority. He testified that at the time he had no authority to hire, fire, discipline, etc., although he could direct other employees' work, to some degree (Tr. 135). In mid-July he was promoted to "PM Manager," a position that clearly had 2(11) supervisory authority. In its answer to the complaint, however, Respondent admitted that "at all times material herein" Gutierrez was a "Lead Supervisor" who was a supervisor of Respondent within the meaning of Section 2(11) and agent of Respondent within the meaning of Section 2(13) of the Act. Having

so admitted, the argument that Gutierrez was not a supervisor at the time he made the comments to Mariscal is not valid or viable at this point, and thus I reject it.

Regarding the actual statement made by Gutierrez, it is true, as pointed out by the General Counsel and the Union in their briefs, that the test in determining whether a statement constitutes creating the impression of surveillance is whether the employees could *reasonably* assume from the employer's statements or conduct that their activities had been placed under surveillance (emphasis supplied). See, e.g., *Greater Omaha Packing Co.*, 360 NLRB No. 62, slip op. at 3 (2014); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 963 (2004); *Flexsteel Industries*, 311 NLRB 257 (1993). As with any statements that are not explicitly threatening or coercive--and there was nothing explicitly threatening or coercive in Gutierrez' statement-- I must, however, examine the context and circumstances in which the statement was made in order to determine whether it would have been reasonable for an employee—in this case Mariscal—to believe that his union or protected activity had been placed under surveillance. I find that no such reasonable conclusion could have been drawn.

First, I note that the evidence indicates that the security surveillance equipment had been in place all over the facility, including the break room, for a long time, long before the Union appeared in the picture (so to speak…), and that the employees were aware of this. Employees thus knew that the cameras were there for security reasons, and had not been placed there to monitor their union or protected activity. When Mariscal started to speak to Gutierrez about the Union in the break room, he did so with full knowledge that there were security cameras in that room, even if he did not know whether such equipment had audio recording capabilities. Second, the evidence shows—and Mariscal admitted—that he and Gutierrez had a friendly relationship, and that indeed he looked upon Gutierrez as a mentor. When Gutierrez told Mariscal to step outside because their conversation might be picked up by the security equipment, he was not creating the impression of surveillance, but was rather being cautious and prudent for his own sake as well as Mariscal's. After all, Gutierrez was at the time a supervisor, and it would have been risky for him to be overheard—even if by accident—giving Mariscal friendly advice about how to engage in union activities. Under these circumstances, I do not believe it was reasonable for Mariscal to assume Gutierrez was suggesting, or implying, that his union or protected activities were being monitored. Rather, the evidence indicates that Mariscal took it at face value-- that Gutierrez was simply telling him to be prudent and not expose himself unnecessarily.[14] Indeed, Mariscal admitted that he did not feel threatened (or, by implication, coerced) by Gutierrez' comments (Tr. 108).

Under these circumstances, I conclude that an employee in Mariscal's shoes would not have reasonably interpreted or assumed Gutierrez' comment to mean that employees were under surveillance, and recommend that this allegation of the complaint (paragraph 7) be dismissed.

[14] By analogy, if a man tells his wife to step away and not parade naked in front of a window with the shades open and the lights on, he is not creating the impression that she is under surveillance (i.e., "there is a Peeping Tom watching you"), but rather cautioning her to be prudent lest she be seen naked.

II. Crosby's Comments Regarding Mariscal's "Badmouthing" of Managers

I found that in early September, as testified to by Mariscal, Crosby told him that he had learned that Mariscal had been "bad-mouthing" managers in conversations with other employees, and that discipline would follow if this conduct continued. The General Counsel, in paragraph 8 of the complaint, alleges that these statements violated Section 8(a)(1) of the Act. For the following reasons, I agree that it did.

In essence, by telling Mariscal that he could not "badmouth" managers in conversations with other employees, Crosby was creating, or at least enforcing, a work rule or directive. To determine the validity of this rule, I must first determine, pursuant to the Board's ruling in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if the rule explicitly restricts activities protected by Section 7. If so, the rule is unlawful. If the rule does not explicitly restrict Section7 rights, I must examine the following criteria: (1) whether employees would reasonably construe the rule to prohibit (or restrict) Section 7 activity; (2) whether the rule was promulgated in response to union activity; (3) whether the rule has been applied to restrict the exercise of Section7 rights. *Lutheran Heritage*, at 647; *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007). See, also, *D.R. Horton*, *Inc.*, 357 NLRB No. 184 (2012), enf. granted in part and denied in part, 737 F. 3d 344 (5th Cir. 2013).

While the rule promulgated and enforced by Crosby does not explicitly restrict Section 7 rights, in my view it violates *Lutheran Heritage* criteria No. 1 and 3, as perhaps criteria No. 2 as well. The ability of employees to engage in discussions with other employees about working conditions, including making comments that might be critical of the conduct, behavior, or modus operandi of supervisors, goes to the very core of protected activity under Section 7. For example, a rule prohibiting "negative conversations" about managers (and associates) was found by the Board to violate Section 8(a)(1) of the Act, because employees would reasonably construe such prohibition to bar them from discussing concerns about working conditions, and would therefore refrain employees engaging in protected activity. *Claremont Resort & Spa*, 344 NLRB 832 (2005). Crosby did not explain what he meant by "badmouthing," a term that is plainly ambiguous and most likely over broad, since it could be interpreted in a myriad of ways, taken to prohibit anything from a mild form of criticism, to ridicule, disparagement, or defamation. Because it is so vague and over broad, Crosby's rule or directive is clearly in violation of Section 8(a)(1) of the Act, since employees could reasonably interpret the rule to preclude discussing with each other what they might perceive to be unfair or ill treatment by supervisors or managers, the type of discussions that are clearly protected by Section 7. *Hills & Dales General Hospital*, 360 NLRB No. 70 (2014) (a rule prohibiting "negative comments" and "negativity"), citing *Claremont Resort*. Moreover, by threatening to discipline Mariscal for future violations of this "rule," Respondent also met the third criteria of *Lutheran Heritage*, thus violating the Act. Finally, since there is no evidence that the "badmouthing" rule was in existence prior to the advent of the Union, Respondent also met the second criteria under *Lutheran Heritage*, thus apparently promulgating this "rule" in response to union activity.

Accordingly, and for the above-discussed reasons, I conclude that by admonishing Mariscal for "badmouthing" managers, and threatening future discipline for engaging in such conduct, Respondent violated Section 8(a)(1) of the Act.

III. Crosby's Comments Regarding Mariscal's Activities During his Breaks

As described above, sometime in early September, Crosby admonished Mariscal for allegedly failing to follow the directive of supervisors regarding what type—or duration—of breaks to take. When Mariscal tried to explain that he had received conflicting directives from different supervisors and was simply trying to get clarification, Crosby told him he did not believe him, that Crosby knew what he was doing, suggesting that Mariscal wanted to arrange his breaks in a manner that would maximize his opportunity to talk to other employees—presumably, about the Union. Crosby also told Mariscal he was going to review video camera footage and talk to other managers to check the accuracy of his statements. The General Counsel alleges in paragraph 9 of the complaint that by engaging in such conduct, Respondent created the impression of surveillance, and impliedly threatened discipline for engaging in protected activity. I agree with the General Counsel.

As discussed previously, the test in determining whether a statement constitutes creating the impression of surveillance is whether the employees could reasonably assume from the employer's statements or conduct that their activities had been placed under surveillance. *Greater Omaha Packing Co.*, supra. When Crosby told Mariscal "I know what you are doing," and essentially accused Mariscal of trying to manipulate his break times in order to engage in union or protected activity (i.e., to talk to other employees), he was reasonably creating the impression that Respondent was monitoring Mariscal's activities. Moreover, although the facts of this incident alone are sufficient, in my view, to reasonably create the impression of surveillance, it should not be considered in isolation. Rather, I believe that other incidents described in this decision also shed light on the tone set by Respondent, which cannot but re-enforce the reasonable impression in Mariscal's mind that he was being closely monitored. For example, Crosby confronting Mariscal about "badmouthing" managers the day after Mariscal had discussions with other employees, and Crosby confronting Mariscal within 15 minutes after Mariscal made comments about Crosby's car to the security guard, Fragoso. Thus, the "I know what you are doing" statement by Crosby cannot but leave a definitely reasonable impression in Mariscal's mind that he was being closely watched, and Crosby's statement regarding Mariscal's motives leave no doubt that it was his protected activity that was being monitored. In these circumstances, I conclude that Respondent created the impression of surveillance and impliedly threatened unspecified reprisals against Mariscal for engaging in union or protected activity. *Smithfield Foods, Inc.*, 347 NLRB 1225, 1230 (2006).

Accordingly, I find that by engaging in the above-described conduct, Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 9 of the complaint.

IV. The Statements Made by Security Guard Fragoso

Paragraph 10 of the complaint alleges that Respondent violated Section 8(a)(1) of the Act when David Fragoso, a security guard employed by G4S and posted at the facility pursuant to its contract with Respondent, told Mariscal that he had been instructed to stop any union activity by employees at the parking lot of the facility. The complaint also alleges, and Respondent denies, that Fragoso was an agent of Respondent within the meaning of Section 2(13) of the Act.

Before determining the merits of the actual unfair labor practice alleged, I must first determine whether the individual responsible for the conduct was an agent acting on behalf of Respondent. In determining the agency status of an individual not employed by the respondent employer or union, the Board has long used common law agency principles. See. e.g., *Cooper Industries*, 328 NLRB 145 (1999); *Southern Bag Corp*., 315 NLRB 725 (1994). While it appears clear that Fragoso, as an employee of a third party did not have actual authority to make, announce, or implement policy on behalf of Respondent, he nevertheless could have had apparent authority to do so, depending on the circumstances. The test in determining agency under such circumstances is whether employees "would reasonably believe that the [alleged agent] was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426-427 (1987); *Einhorn Enterprises*, 279 NLRB 576 (1986). Agency status by security guards has been found by the Board and courts in circumstances similar to the present case, where security guards protected the integrity of the employer's premises and were posted at gates and entrances to control ingress and egress the employer's premises. See, *NLRB v. Southwire Co.*, 801 F.2d 1252, 1254 (11th Cir 1986), citing *Harrison Steel Castings Co.*, 262 NLRB 450, 455 fn. 6 (1982).

Under these precedents and circumstances, I conclude Fragoso, as a security guard, had apparent authority on behalf of Respondent, because employees could reasonably believe that he was acting under and at the direction of Respondent's management. Indeed, as previously discussed, there is evidence suggesting that Fragoso was keeping Respondent, and specifically Crosby, closely informed of Mariscal's activities, further enhancing, in my view, his apparent close connection with Respondent's management and thus his apparent agency status.

I have credited Mariscal's testimony, and found that Fragoso told him that he had been instructed to "shut down" any union activity in the facility's parking lot, thus warning Mariscal to refrain from such activity or face unspecified reprisals. Such warnings are plainly coercive, as they reasonably tend to interfere with employee rights to engage in activity protected by Section 7 of the Act. The fact that Mariscal and Fragoso may have had a friendly relationship, and that Fragoso's "head's up" notice may have been meant as a "benevolent" warning, does not alter the coercive impact of such statement. *Jordan Mash Stores, Corp.*, 317 NLRB 460, 462-463 (1995); *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975).

Accordingly, I find that by engaging in the above-described conduct, Respondent prohibited employees from engaging in protected activity, and impliedly threatened unspecified reprisals if they engaged in such protected activity, as alleged in the complaint, thus violating Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Express Messenger Systems, Inc., d/b/a Ontrac (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union No. 63, International Brotherhood of Teamsters (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling an employee to refrain from "badmouthing" managers during conversations with other employees, and threatening discipline if repeated; by creating the impression that an employee's union or protected activities were under surveillance, and threatening unspecified reprisals for engaging in such activity; by informing an employee that union or protected activities would not be allowed, and by threatening unspecified reprisals if employees engaged in these activities, Respondent violated Section 8(a)(1) of the Act.

4. Respondent did not otherwise violate the Act as alleged, specifically as alleged in in paragraph 7 of the complaint.

REMEDY

The appropriate remedy for the 8(a)(1) violations I have found is an order requiring Respondent to cease and desist from such conduct and to take certain affirmative action consistent with the purposes of the Act.

Specifically, having found that Respondent violated Section 8(a)(1) of the Act by telling an employee to stop "badmouthing" managers, and threatening discipline if such conduct was repeated; by creating the impression that employees' union or protected activities were under surveillance, and threatening unspecified reprisals for engaging in such activity; and by informing an employee that union or protected activities would not be allowed, and threatening unspecified reprisals if employees engaged in such activities, I shall recommend that Respondent be ordered to cease and desist from such conduct. Additionally, Respondent will be required to post a notice to employees, in English and Spanish, assuring them that Respondent will not violate their rights in this or any other related manner in the future. Finally, to the extent that Respondent communicates with its employees by email, it shall also be required to distribute the notice to employees in that manner, as well as any other electronic means it customarily uses to communicate with employees.

Accordingly, based on the forgoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[15]

ORDER

Respondent, Express Messenger Systems, Inc., d/b/a Ontrac, Commerce, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Telling employees to stop "bad-mouthing" managers or otherwise speaking to their coworkers about working conditions, and threatening discipline for doing so.

(b) Creating the impression that employees' union or protected activities were under surveillance, and threatening unspecified reprisals for engaging in such activities.

(c) Informing employees that union or protected activities would not be allowed, and threatening unspecified reprisals if employees engaged in such activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Within 14 days after service by the Region, post at all its facility in Commerce, California, where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2014.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 21, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. September 24, 2015

Ariel L. Sotolongo
Administrative Law Judge

[16] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT tell employees that they cannot "bad-mouth" managers or otherwise speak to their coworkers about working conditions, or threaten to discipline them for doing so.

WE WILL NOT create the impression that employees' union or protected activities are under surveillance, or threaten unspecified reprisals against employees for engaging in such activities.

WE WILL NOT inform employees that their union or protected activities would not be allowed, and threaten unspecified reprisals if employees engage in such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

EXPRESS MESSENGER SYSTEMS, INC.
D/B/A ONTRAC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-137530 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5184.